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Supreme Court of the United States

OCTOBER TERM, 1941.

No. 237

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WILLIAM G. WHEAT, PETITIONER,

VS.

FORD MOTOR COMPANY, A CORPORATION,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE 8th CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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WHITSON ROGERS,
MARTIN J. O'DONNELL,
Attorneys for Petitioner.

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES
Your Petitioner Respectfully Says:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The case below was a patent infringement suit. The trial court found the patent noninfringed and valid. Court of appeals affirmed as to noninfringement.

The Patent.

On October 18th, 1921, petitioner was granted a patent for an invention (Tr. 287-295). Between 1932 and 1938 respondent infringed said patent. The purpose of the patent was to construct or reconstruct a light-weight motor car with transverse front and rear springs, so that such car would hold the ground or surface when traveling at high speed (Tr. 293).

The patent was a combination of elements. The combination in each claim was prefaced by an introductory phrase (Tr. 295). That phrase was the patent title. It was no part of the combination. Nor did the title accurately describe the combination.

The elements co-operated together to enable such automobile to safely travel at high speed. Those elements so co-operating lowered the center of gravity of the structure and in addition thereto dampened the vibration of the rear axle (Tr. 156) by producing a "phenomenon" which had the same effect as if the moment of inertia of the rear axle were increased (Tr. 148, 149, 150, 151) and also by reducing the oscillation of the front axle at high speed (Tr. 23). This combination enabled such car to hold the ground or surface (Tr. 293) and to give it a greater degree of stability at high speed in any case (Tr. 156).

The "phenomenon" enabled the rear wheels and tires to lessen skidding tendencies by remaining in contact with the road for a greater length of time for the distance travelled. The element of the combination known as the rear spring placed to the rear of the rear axle not only contributed to the lowering of the center of gravity (Tr. 293) by bringing the body of the car closer to the road (Tr. 293) but also produced the "phenomenon" described by the expert scientist, without contradiction, as producing the same effect as if the moment of inertia were made larger (Tr. 151).

The element known as the forked end radius rod gripping the front axle above and below at the spring perch location (Tr. 160-293, Fig. 4, and Fig. 8, Tr. 289) preserved the tilt of the axle (Tr. 23) and lessened the weave thereof at high speed thereby co-operating with the lowered center of gravity and the above-mentioned phenomenon of the rear axle to stabilize the car at high speed.

The element described in the specifications as a substantially U-shaped rear bracket (Tr. 293) illustrated by right photo (Tr. 269) and Figure 6 (Tr. 289) of the patent drawings lowered the main or body portion of the frame.

The element described as a Z-shaped bracket in front contributed to the lowering of the main portion of the frame and the power plant by suspending the power plant behind the front spring on the lower rear flange of the Z bracket and suspending the upper or forward flange of the bracket on the front spring as illustrated in right photo (Tr. 269) and Figure 4 (Tr. 289) and Figure 1 (Tr. 291) and by defendant's exhibits at (Tr. 377 and 379). The Z bracket in combination with the U-shaped or "goose neck brackets" described by court of appeals (Tr. 486) created a *drop side sill frame* which was one of the factors in lowering *the center of gravity of the body of the car* (Tr. 250) as admitted by respondent's expert. The court of appeals (Tr. 486) in describing the elements of the patented combination wholly overlooked the element consisting of the forked end radius rod described in the claims (Tr. 295), the specification (Tr. 293) and illustrated by Figure 8 of the drawings of the patent (Tr. 289) and shown in the accused structure (Tr. 271) (Tr. 365) (right upper photo from bottom of record right lower from bottom of Defendant's Exhibit "6"). This grave omission was due doubtless to like carelessness on the part of the trial court which substituted an "etc." for said radius rod in its opinion (Tr. 455) and wholly ignored it in its findings of fact (13-14-15) and

conclusions of law (Tr. 15-16). Manifestly neither court ever read the patent.

The patent was used by others before respondent infringed. Chevrolet Brothers Manufacturing Company of Indianapolis, Indiana, originators of the popular Chevrolet automobile, used said patent in their "Fronty Ford race cars" and paid petitioner for such use (Tr. 297) (Tr. 107-108-109).

The officers of respondent were familiar with petitioner's patent many years before respondent infringed it. The letterhead of Chevrolet Brothers advertises the racing car. The letterhead contains a reproduction of a photograph taken at the Indianapolis speedway with the statement thereon (Tr. 297):

"Indianapolis Speedway—500 mile race." Beneath the photograph is the legend "Henry Ford seated in car."

The well-known form and face of the automobile magnate is reproduced. The photograph reproduces the faces and forms of a number of others standing around the car including the famous son of the automobile magnate, Edsel Ford, also the brothers, Louis and Arthur Chevrolet, and H. C. Stutz of Stutz motor car fame (Tr. 297).

A Mr. Wilbert Hunt was works plant manager for Chevrolet Brothers Manufacturing Company for a period between the date of the issuance of petitioner's patent and respondent's infringement (Tr. 188). He was also a professional automobile race driver on the Indianapolis speedway in Ford race cars (Tr. 172, 173, 179). In the year 1926 respondent sent an attorney to interview Mr. Hunt at Indianapolis who gave such information concerning the structure as he had (Tr. 116, 211, 212). The above evidence was given by Mr. Hunt who was called by respondent as its chief witness in support of its unfounded claim of anticipation (Tr. 172). However, respondent did not infringe the patent until the year 1932 in its V-8 Ford cars.

Respondent established by its said witness Hunt and by its copyrighted magazine articles in the "Ford Owner," Exhibits 17 (Tr. 405 *et seq.*) and 18 (Tr. 435 *et seq.*), that the discovery made by petitioner and so used on the Indianapolis speedway supplied a long-felt want. As late as September, 1932, about the time respondent first infringed the patent the eminent aeronautical engineer and designer, William B. Stout, in his article entitled "The Motor Car of the Future," in the copyrighted magazine, "Popular Mechanics," wrote (p. 443):

> "Low center of gravity is not necessarily an indication of roadability. Indeed, some of the present cars actually are swung so close to the road that skidding tendencies are vastly increased. The center of mass must be so disposed that the side thrust created in turning corners presses downward on the outside wheels thus increasing traction and preventing skidding" (Tr. 18).

However the above is true only as long as the rear tires actually remain in contact with the road. If the rear axles and wheels start vibrating due to bumps in the road traction is lost and skidding begins. Petitioner's patent tends to dampen undue vibration of the rear axle and wheels by producing the same effect as if the moment of inertia of said axle were made larger (Tr. 151) which inertia effects cannot be produced merely by lowering the center of gravity but depends on the contribution thereto made by all the elements and especially on the element of the combination, placing rear spring to rear of rear axle. Respondent's expert concurred (Tr. 252) and thus conclusively established that merely lowering the center of gravity as had been done by those who were experimenting and seeking for the discovery made by petitioner accomplished nothing except lowering the center of gravity and that their efforts merely amounted to abandoned experiments of the type both lower courts evidently had in mind when they wrote their erroneous opinions.

The Accused Structure.

The accused infringing combination consists of elements duplicating those of petitioner's patent. Those elements co-operate in combination to lower the center of gravity of the accused structure and in addition thereto to dampen the vibration of the rear axle by producing the same phenomenon as the patent, to-wit: causes the same effect as if the moment of inertia of the rear axle were increased (Tr. 148, 149, 150, 151) and also by reducing the oscillation of the front axle when traveling at high speed. This combination enables the accused structure to hold the ground or surface when traveling at high speed as though the accused structure were literally glued to the road (Tr. 43) and to give it a greater degree of stability at high speed in any case (Tr. 156).

The "phenomenon" enables the rear wheels and tires of the accused structure to remain in contact with the road for a greater length of time for the distance travelled and thus lessens skidding tendencies (Tr. 148, 149, 150, 151).

The element of the combination in the accused structure known as "the rear spring placed to the rear of the axle" not only contributed to the lowering of the center of gravity (Tr. 281) by bringing the body of the accused structure closer to the road (Tr. 285) as conclusively established by respondent's admitted copyrighted catalogues received in evidence (though denied by its counsel (Tr. 66) and expert witness Brush) (Tr. 242) but also produced the "phenomenon" described by Professor Hoecker without contradiction as "causing the same effect as if the moment of inertia were made larger" (Tr. 151).

The forked end radius rod element duplicated that of the patent and is illustrated by that element in "Plaintiff's Exhibit 3" (Tr. 271) and "Defendant's Exhibit 6" (Tr. 365) right upper photo (from bottom of record) and right lower photo (from bottom of the picture). It grips the front axle above and below at the spring perch (Tr.

365) location and preserves the tilt of the axle (Tr. 23) thereby lessening the oscillation thereof at high speed and thereby co-operating with the lowered center of gravity and the above-mentioned "phenomenon" of the rear axle to stabilize the car at high speed.

The element in the accused structure referred to in the evidence and court opinions as "drop side sills" are illustrated by Exhibits 3 (Tr. 271), 4 (Tr. 273), 15 (Tr. 299), 6 (Tr. 277) (Tr. 35) (Tr. 31).

The drops or "kicks" in the portion of the frame over the rear axle are integral duplications of the "U" channel (Tr. 293) or "goose neck" rear brackets referred to in the opinion of the court of appeals (Tr. 486) and likewise operated in the same way to lower the center of gravity of the main portion of the frame of the accused structure.

The element described by respondent's counsel as a "Z form" (Tr. 64) "less deeper arched cross member" (so described by respondent's expert Brush) contributed to the lowering of the center of the main portion of the frame and the power plant by (Tr. 242) suspending the engine behind the front spring in the accused structure on the rearwardly extending lower flange of said "Z form" cross member (Tr. 68) in the same way that the engine and chassis is suspended behind the front spring in the patented structure on the rearwardly extending lower flange of the Z bracket of the patent (Tr. 66). The upper horizontal portion of the "Z form" front cross member is supported on the front spring and corresponds to the upper flange of the Z bracket of the patent and is secured to the spring in the same way in front of the engine mounting. This is illustrated by Defendant's Exhibit 1 (Tr. 313). This Z form less arched cross member in combination with the integral "goose neck" brackets of the frame over the rear axle is the "drop side sill" frame which is one of the factors in lowering the center of gravity of the body of the accused structure.

The court of appeals in describing the element of the accused combination wholly overlooked the element consisting of the forked end radius rod of the accused structure illustrated by Defendant's Exhibit 6 (Tr. 365) right upper photo and described in the evidence (Tr. 160) (see also Tr. 271). This grave omission was doubtless due to like carelessness on the part of the trial court which did not even substitute an "etc." therefor and which seemed to think that the *only* elements in the accused structure was "a drop front axle" and "drop center side sills" according to its opinion (Tr. 455) (Tr. 457) (Tr. 458), a statement contradicted by its own Finding of Fact 3 (Tr. 14) which adds "a flattened spring" and also contradicted by the court of appeals which found in addition that "the rear spring to rear of rear axle" (Tr. 486) was a part of the lowering combination. Indeed the findings of the trial court demonstrate that it had no conception of the facts in the record and that it in effect permitted the respondent to decide the case, for that court made Finding of Fact 7 at respondent's suggestion notwithstanding respondent's own admitted copyrighted catalogues (Tr. 281, 285) contradicted said suggested and given finding of fact. That finding recites:

> "The rear spring suspension in the accused construction is not a factor in the lowering of the main portion of the chassis—etc." (Tr. 14).

Whereas the catalogue says (Tr. 281) of the rear spring back of the rear axle,

> "*This contributes* to the lowness which is a feature of the new Fords."

And on the same subject its catalogue says,

> "By this method (rear spring back of rear axle) the body may be mounted close to the road and a low center of gravity obtained (Tr. 285) spring hangers are mounted behind the axle which considerably lowers the body" (Tr. 285).

And the court of appeals in its opinion held that as to the accused structure:

> "The lowering of the body was accomplished through the use of a drop center front axle, a flatter front spring, double drop chassis side rails and a rear spring suspended behind the rear axle" (Tr. 459).

~~Manifestly~~ It is manifest the trial court neither read nor heard the exhibits read and that the court of appeals did read Exhibits 8 (Tr. 281) and 10 (Tr. 285).

However, both courts overlooked the undisputed fact that the Z form less arched front cross member and raised frame (Tr. 64) (Tr. 242) constituted a contributing factor in the lowering of the accused structure and power plant and operated in the same way to contribute to said lowering as did the Z bracket of the patent.

The raised frame and Z formed cross member of the accused structure (Tr. 231, 365) together equal the overall height of the body portion of the Z bracket of the patent and it was conclusively established by respondent's witness Hunt (Tr. 180) with the concurrence of petitioner (Tr. 82) that said raised frame and cross member together accomplished the same distance lowering as the Z bracket of the patent, and ~~constructed~~ construed an equivalent thereof.

From this it follows that it is manifest that neither court ever fully read the record. Said courts never found anything in respondent's catalogues or advertising matter to justify the finding that a "drop center front axle" and "flattened spring" contributed to the lowering of the body of the accused structure. The only catalogue reference to a front axle is at (Tr. 23) which does not even use the adjective "drop" or the phrase "drop center" in describing the axle and no mention whatsoever is made in said catalogues or

advertising matter of a "flattened front spring" and respondents never offered any catalogues or literature in evidence to sustain its own findings (Tr. 14) so adopted by the trial court and likewise so adopted by the court of appeals. The substitution of these findings for the real facts by courts of conscience challenges the attention of this court in this proceeding.

What the Lower Courts Did.

The trial court construed the patent as though it were an odious monopoly that is—narrowly—and though there was nothing in the language of the patent to justify it held that petitioner did not have a patent such as would prevent the embodiment of his patent in a new or originally constructed automobile and that such embodiment of his patent in the accused structure did not infringe on the untenable ground that the patent is limited to old cars. The court of appeals affirmed on this ground (Tr. 488). It is evident that both courts having decided against petitioner on the foregoing untenable theory were careless in their *obiter* examination of the facts.

The opinion of the Court of Appeals giving its *obiter* conclusion that each of the means employed by respondent in its accused structure made its separate contribution toward securing the desired result, has no merit since the court's opinion shows that it did not know what the elements of the accused structure were and in any event exhibits 3 (Tr. 271) and 15 (Tr. 299) show that the accused structure is a physical entity and, as a physical fact, that each part of the accused structure in operation is dependent on every other part and all must jointly operate to produce the desired result.

Elements of Old Model T Ford Car

(are set out across the page).

Elements of Patented Combination	Elements of Accused Combination
1. Rear transverse spring secured at points rearwardly of the adjacent rear axle (Tr. 293-295-291-289).	1. Rear transverse spring secured at points rearwardly of the adjacent rear axle (Tr. 488-267-271-273).
1. Rear transverse spring secured directly on top of rear axle (Tr. 269-351, Fig. 2).	
2. Substantially Z-shaped front bracket the upper projecting flange of which supports the structure on top of the front spring. Rearwardly projecting flange of bracket supporting power plant behind front spring and forward portion of frame side sills secured to extremities of front cross member (Tr. 295).	2. Substantially Z-formed U-shaped inverted less arched channel front cross member with rearwardly horizontal projecting flange, the top lower surface of which supports the structure on top the front spring. The rearwardly horizontal projecting flange supporting the power plant behind the front spring and raised forward portions of frame side sills secured to extremities of front cross member (Tr. 64-313).
2. U-shaped inverted channel front cross member without horizontal flanges extending to either front or rear. Power plant or motor secured to cross member directly above front spring, and forward portion frame side sills secured to extremities of front cross member (Tr. 269).	
3. Forked end radius rod gripping the front axle above and below at the	3. Forked end radius rod gripping the front axle above and below at the

spring perch locations and preserving the tilt of the front axle (Tr. 295-160).	spring perch locations and preserving the tilt of the front axle (Tr. 289-365-23-160).

3. Front radius rod of substantially V shape secured to extremities of front spring to spring perches at points either above or below the axle but not at points both above *and* below axle as in the patented and accused structures. The old radius rod had either a bolt end or an eye and depending on the age of the car (Tr. 365) upper photos.

4. Goose neck U channel form rear brackets set forth in specifications but not in claims which produced a *drop side sill frame* (Tr. 289-269).	4. Goose neck U channel rear bracket made integral with and producing a *drop side sill frame* (Tr. 271-273).

4. Model T Ford used a straight side sill frame *without drop center side sills or kicks.*

B.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

I.

The trial court decided and the court of appeals affirmed the judgment of the lower court holding that the patent was an odious monopoly and that the mental concept embodied by petitioner was limited to an old structure and that its embodiment in a new structure could not infringe, which rule of narrow construction is in direct conflict with the liberal rule of construction applied to patents for inventions by this and all other courts since the beginning of the government and consequently this consideration alone makes this case more than an ordinary

patent case wherein fact questions as to validity and infringement may be involved and is a case where a question of pure law, to-wit: (In the *Baldwin Case*, 99 F. (2d) 1,) the construction of a patent has been decided by both lower courts applying a narrow rule of construction to this patent—a rule in conflict with the decisions of this and all the other circuit courts of appeals and hence certiorari should issue.

The rule applied to patents in the *Monopolies Case*, 11 Coke 88, was never applied in this country until it was applied herein by both lower courts. *Blanchard* v. *Sprague*, 3 Sumn. 535, by Story, J.; *Grant* v. *Raymond*, 6 Pet. 218, per Marshall, C. J. The rule is that patents for inventions must be liberally construed.

Winans v. *Denmead*, 15 How. 330, a leading case involving a lower center of gravity of a structure.

Turrill v. *Ry.*, 1 Wall. 491.

Smith v. *Snow*, 294 U. S. 1.

Rubber Co. v. *Goodyear*, 9 Wall. 788.

Motion Picture Patents Co. v. *Universal Film Mfg. Co.*, 245 U. S. 503.

Klein v. *Russell*, 19 Wall. 433.

McClain v. *Ortmayer*, 141 U. S. 419.

Topliff v. *Topliff*, 145 U. S. 156.

Said rule was ignored by both lower courts and hence certiorari should issue.

II.

Since both lower courts contradicted each other as to the facts found by them and the findings by both were clearly wrong and since both lower courts as to the facts they omitted to find were clearly wrong and since both lower courts applied a narrow rule of construction to the patent itself and limited its application to old or already constructed automobiles without any justification in the language of the patent for such construction and thus and

thereby in this litigation destroyed petitioner's property right in his patent contrary to all the decisions of this court and of all the other circuit courts of appeals it follows that this is a case involving questions other than ordinary issues of validity and infringement of particular patents and consequently the writ should issue.

Jurisdiction of the Supreme Court, pp. 670, 671, in Robertson and Kirkham and cases cited.

III.

The patent case involved herein is of a character to which the rule concerning certiorari involved in all other cases applies, to-wit: a conflict of decisions between circuit courts of appeals is a ground in itself for a writ of certiorari in patent cases of this character as in all other cases where such rule applies.

Ensher v. *Simon Asher & Co.*, 282 U. S. 445.

Rice & Adams Corporation v. *Lathrop*, 278 U. S. 509.

Hurn v. *Oursler*, 289 U. S. 238.

Hammond Clock Co. v. *Schiff*, 293 U. S. 538.

Wine Railway Appliance Co. v. *Enterprise Railway Equipment Co.*, 297 U. S. 387.

The question here involved is a question of pure law, to-wit:

Whether the mental concept embodied in the patented combination could be used by respondent in its accused structure without infringement and whether it applied to originally constructed or old cars.

This question is presented by the opinion of the court of appeals when in discussing the claims it said:

> "that each is for a combination of elements arranged in a specific way for the purpose of lowering the body of an *already constructed automobile*" (Tr. 488).

IV.

Even if there were no conflict between the decision of the court of appeals and those of other circuit courts of appeals yet the narrow rule of construction applied is contrary to the liberal rule of construction of patents for inventions observed by this court from the beginning of this government and since the decision of the courts of appeals has failed to give effect to the scope of the patent required by the Constitution and laws by approving respondent's conduct in intentionally embodying the patented structure in its accused structure and has thereby failed to give effect to the rulings of this court requiring liberal construction of patents and hence, the writ should issue.

Carbice Corp. of America v. *American Patents Development Corporation*, 283 U. S. 27.

Adams Grease Gun Corporation v. *Bassick Mfg. Co.*, 285 U. S. 531.

This court has always held that patents must be liberally construed.

V.

This patent case is one involving novel and important questions concerning the application of a general rule of law as to the rights of persons to protection by the federal courts against persons who intentionally destroy such rights for their own gain by flouting the Constitution and laws of the country adopted and enacted for the protection of such rights and the writ should therefore issue.

Keystone Driller Co. v. *General Excavator Co.*, 290 U. S. 240.

United States v. *Dubilier Condenser Corp.*, 289 U. S. 178.

Leman v. *Krentler-Arnold Hinge Sash Co.*, 284 U. S. 448.

Vulcan Mfg. Co. v. *Maytag Co.*, 293 U. S. 553.

VI.

The opinion of the district court after limiting the patent to old automobiles and authorizing its embodiment in new stated that the lowering of the accused structure was accomplished by a "drop axle" and "drop side sills"; the opinion of the court of appeals after likewise limiting the patent to old automobiles and holding that respondent's new structure by embodiment of the patent could not infringe yet proceeded to find facts endeavoring to show the patent was not so embodied and found that in addition to the "drop axle" and "drop side sills" mentioned in the lower court's opinion the accused structure accomplished its lowering by also using "a flatter spring" and "the rear spring to the rear of the rear axle"; in other words the findings in their opinions by both lower courts as to the elements of the combination in the accused structure are in conflict and hence the principle that findings of fact concurred in both lower courts will be accepted by the Supreme Court does not apply.

Morimura A. & Co. v. *Taback*, 279 U. S. 24.

Herein there is a conflict of decisions between the lower courts in respect of an issue turning upon the facts, to-wit: the elements of the combination in the accused structure and in the patented structure and consequently the concurrence of the two courts in the decision against petitioner will not control and this court will itself ascertain wherein the truth lies.

Sanitary Refrigerator Co. v. *Winters*, 280 U. S. 30.

VII.

Not only is there a conflict between both lower courts as to the elements of the combination of the accused structure but both said lower courts ignored the conceded fact established by the evidence of the respondent and concurred in by petitioner to the effect that the lowering of the accused structure was accomplished in front by a "Z-

formed" (Tr. 64) "less deeply arched cross member" (Tr. 242) which statement was concurred in by the petitioner and consequently the concurrence of both courts in omitting this element so conceded to be a factor in the lowering of said accused structure is clearly wrong and the concurrence of both courts in this plain error cannot be accepted by this court.

Continental Paper Bag Co. v. *Eastern Paper Bag Co.*, 210 U. S. 405.

Altoona Publix Theaters, Inc., v. *American Tri-Ergon Corp.*, 279 U. S. 1005.

Concrete Appliances Co. v. *Gomery*, 269 U. S. 177.

VIII.

Since the undisputed facts established by the evidence of the respondent show that the patented and accused structures each have a combination of lowering elements which have the same form, method of operation, result and function, it follows that the accused structure has infringed petitioner's patent and the holdings by both courts that the patent applied only to old automobiles and not to new is an express decision holding that the embodiment (in an old car) of the mental concept (which mental concept is the basis of the invention) is the invention and that such embodiment (in an old car only) was the subject of the patent and that the mental concept which is the basis of invention is not the subject of the patent—a decision which directly conflicts with the decision of this court in *U. S.* v. *Dubilier Condenser Corp.*, 289 U. S. 178, l. c. 192, and necessitates the issuance of the writ.

IX.

The opinion of the district court indicates that it decided the case upon the theory that the patent was an odious monopoly of the kind referred to in *The Monopolies Case*, 11 Coke 88, and hence to be narrowly construed after the fashion pointed by Justice Story in 3 Sum. 502,

pursued by the English courts in construing patents for inventions and by the application of which it applied the patent to old cars only—a rule directly contrary to that observed by this court and well illustrated in its decision in *Turrill* v. *Ry.*, 1 Wall. 491, when it approved Justice Story's condemnation thereof in the above case as follows:

> "Patents for inventions are not to be treated as mere monopolies and, therefore, odious in the eyes of the law; but they are to receive a liberal construction, and under the fair application of the rule, *ut res magis valeat quam pereat*, are, if practicable, to be so interpreted as to uphold and not to destroy the right of the inventor. *Ryan* v. *Goodwin*, 3 Sumn. 520."

The opinion of the court of appeals affirmed this untenable doctrine and because of the conflict the writ should issue.

X.

Respondent intentionally appropriated petitioner's patent on the theory that all patents are odious monopolies of the kind referred to in the *Monopolies Case* (11 Coke 84a-86a), as judicially determined in *Parker Rust Co.* v. *Ford Motor Co.*, 23 F. 2d 502, l. c. 506, where it is said:

> "The record shows, too, that Mr. Henry Ford, who dominates the defendant corporation, is absolutely opposed to the operation of the present patent system and to the payment of royalties to anyone. This is clearly expressed by a statement made by Mr. Davis, defendant's patent attorney stationed at the plant: 'There is no power on earth, this side of the Supreme Court of the United States, which would make Henry Ford sign a license agreement or pay a royalty."

The lower courts approved this opposition of respondent to the Constitution and laws of the United States and denied to petitioner the protection and security guaranteed to him by Article I, Section 8, Clause 8, of the

Constitution requiring the Congress "to promote the progress of science and the useful arts" by securing to inventors for limited times the right to their discoveries and therefore decided the case against petitioner and in direct conflict with the command of the applicable provisions of the Constitution and laws of the United States and by so doing acting in excess of the power and jurisdiction vested in said courts by the Constitution and laws and for said reason the writ should issue.

XI.

The court of appeals incorrectly stated the file wrapper history. Its opinion reproduces the patent examiner's first letter of rejection (Tr. 486-331) and reproduces a letter of petitioner's attorney submitting five substituted claims (Tr. 487) but does not point out that the claims then substituted were not (Tr. 343) allowed and said letter so quoted in the opinion did not accompany the claims which were finally allowed but ~~what~~ that another letter of petitioner's attorney omitting the matter in the letter set out in the opinion accompanied the claims finally allowed (Tr. 345) (Tr. 347). The opinion omitted to point out that the only element of the claimed combination rejected on references was "the rear spring to the rear of the rear axle" and that this element was allowed as originally written. No other element was rejected on references. The opinion omits to point out that the combination was never rejected and omits that the rejection of an element of a combination later included in the claims of the combination does not narrow the scope of the claims of the combination. Hence certiorari should issue because the opinion conflicts with *Smith* v. *Snow*, 294 U. S. 1, and cases cited.

XII.

The opinion of the court of appeals incorrectly stated that the prior art necessitated a narrow construction of

the patent. The evidence of respondent's expert (Tr. 251) demonstrated that the combination of the patent was never known to the automobile industry or the public either in publication or structure and that the patent was the first in the art and because no other patent of that genera or species was ever issued since but the opinion of the court of appeals fails to mention these facts and that its assertion that the claims were limited by the prior art had no foundation in the evidence.

XIII.

The opinion of the court of appeals mentions the specifications as justifying a narrowing of the scope of the patent. But the specification notwithstanding it was not necessary so to do under the ruling in *Winans* v. *Denmead,* 15 How. 330, specifically points out that only the preferred method or form was specified and did not limit or narrow the patent. The opinion omits to point out that the specifications instead of limiting the paten to reconstructed cars also specifically included the embodiment in the "construction" of cars.

XIV.

The opinion of the court of appeals assumes that the accused device did not include elements essential to plaintiff's patented combination (Tr. 490).

However said opinion points out (Tr. 486) all the elements of petitioner's patent save and excepting the front radius rod and thereby found that the Z bracket of the patent and all its parts mentioned in the claims were one element in accordance with the rule stated by the court in *Reed* v. *Edwards*, 101 F. 2d 550, thus:

> "For patent purposes a given structure may in one sense be considered a single element and in another sense it may be so formed as to consist of several elements depending upon the functions to be performed by such elements."

The record and copyrighted catalogues show that they contain no basis for said assumption.

XV.

The Z-shaped bracket of the patent and the Z-formed less arched cross member and raised forward frame of the accused structure were identical means which operated in the same way to perform the same function and produce the same result and are therefore the equivalents of each other. That is to say:

Both elements are of Z shape or form. Both elements support the power plant on a rear extending flange back of the front spring. Both elements rest on the front spring on the lower surface of the upper flange of the Z bracket and Z-formed cross members in what respondent's counsel referred to as its single Z form rather than its double Z form. Both elements thus supporting the respective structures and power plants. Both elements contributed to the lowering of the body portion of the structures and power plants.

It follows that these elements of both structures were either duplicates or equivalents of each other and that the decision of the court of appeals is in conflict with the decision of this court in *Winans* v. *Denmead,* 15 How. 330 (a lowered center of gravity patent case), and all the authorities since following that leading decision and hence certiorari should issue.

XVI.

The court of appeals erred in holding that the introductory phrase constituting the title of the patent and not accurately describing the combination was a part of the combination set forth in each claim and said ruling conflicts with the fundamental verities and with the follow-

ing decisions of other circuit courts of appeal on this identical point and hence certiorari should issue.

In re Garratt, 63 F. 2d 113.
In re Abrahamsen, 56 F. 2d 871.
In re Dowe, 53 F. 2d 543.
Nye Tool and Machine Works v. *Crown Die and Tool Co.*, 292 Fed. 851.
Sly v. *Russell & Co.*, 189 Fed. 61.

XVII.

Petitioner's patent solved a problem for the solution of which others had sought in vain and made a substantial contribution to the safety of highway travelers and hence the patent was entitled to a liberal construction of its claims and a liberal application of the doctrine of equivalents and the decision of the court of appeals on this point is in direct conflict with the decision of the Court of Appeals for the Fourth Circuit in *Oates* v. *Camp*, 83 F. 2d 111.

XVIII.

Petitioner's patent is for a combination covering a function never before performed and since no such patent has ever issued before or since in its art it is a pioneer patent entitled to the broadest range of equivalents and the decision of the court of appeals is therefore in conflict with all the decisions of this and the other courts of appeals on the subject.

Boyden Power Brake Co. v. *Westinghouse*, 170 U. S. 537.
Singer Mfg. Co. v. *Cramer*, 192 U. S. 265.

XIX.

This is a case peculiarly calling for the exercise of the discretion rested in this court by the statute to issue the writ prayed for as pointed out in *Forsyth* v. *Hammond*, 166 U. S. 506; *Magnum* v. *Coby*, 262 U. S. 159, and Rule 38 of this court.

Wherefore, your petitioner prays that a writ of certiorari under the seal of this court directed to the United States Circuit Court of Appeals for the Eighth Judicial Circuit commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of said United States Circuit Court of Appeals for the Eighth Circuit and of case numbered and entitled in its docket No. 11720, civil, William G. Wheat, appellant, vs. Ford Motor Company, a corporation, appellee, to the end that cause may be reviewed and determined by this court as provided for by the statutes of the United States and that the judgment of the United States Circuit Court of Appeals for the Eighth Circuit be reversed by this court, and for such further relief as to this court may seem proper.

Kansas City, Missouri, July 1st, 1941.

William G. Wheat,
Petitioner,
By EVERETT MEYER,
WHITSON ROGERS,
MARTIN J. O'DONNELL,
Counsel for Petitioner.